UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6887

MARKUS ODON MCCORMICK,

Petitioner - Appellant,

v.

WARDEN DANIEL EVERETT,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, District Judge. (5:23-hc-02131-D-RJ)

Submitted: January 2, 2025 Decided: January 22, 2025

Before THACKER, QUATTLEBAUM, and HEYTENS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Markus Odon McCormick, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

"Appendix A"

PER CURIAM:

Markus Odon McCormick seeks to appeal the district court's order dismissing his 28 U.S.C. § 2254 petition without prejudice for failure to exhaust state remedies. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

The district court found that McCormick's § 2254 petition was a mixed petition of both exhausted and unexhausted claims. The court rejected McCormick's claim that an inordinate delay in state court excused his failure to exhaust. The court further declined to allow McCormick to proceed with his exhausted claims, reasoning that he had ample time to exhaust all his claims in state court and return to federal court under § 2244(d)(1). Thus, the court dismissed the petition without prejudice to allow McCormick to refile it after exhausting his claims in state court. On appeal, McCormick argues that the district court erred in finding that some of his claims were unexhausted and that dismissing his petition

as mixed was improper and constitutes prejudicial error, and that failure to review his petition would result in a fundamental miscarriage of justice.

We have independently reviewed the record and conclude that McCormick has not made the requisite showing. Accordingly, we deny McCormick's motions to expedite and for bail or release pending appeal and deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:23-HC-2131-D

MARKUS ODON MCCORMICK,	)	
	)	
Petitioner,	)	
	)	
v.	)	**ORDER**
	)	
WARDEN DANIEL EVERETTE,	)	
	)	
Respondent.	)	

Markus Odon McCormick ("McCormick" or "petitioner"), a state inmate proceeding pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 [D.E. 9]. On October 27, 2023, the court reviewed the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts and directed the clerk to serve respondent with the petition [D.E. 10].

On February 5, 2024, respondent responded and moved to dismiss the petition as unexhausted [D.E. 17–19].[1] The court notified McCormick of the motion to dismiss, the consequences of failing to respond, and the response deadline [D.E. 20]. See Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam). McCormick responded in opposition [D.E. 21, 24–25], respondent replied [D.E. 23, 26], and McCormick filed a surreply [D.E. 27]. McCormick moves for an expedited decision [D.E. 28]. As explained below, the court grants

[1] The court has considered McCormick's motion for reconsideration of the court's December 1, 2023 order granting respondent's motion for an extension of time [D.E. 15] under the governing standard. See Fed. R. Civ. P. 54(b); Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 514–15 (4th Cir. 2003). The court denies the motion.

"Appendix B"

respondent's motion to dismiss, dismisses without prejudice McCormick's petition as unexhausted, and denies McCormick's motions.

I.

On July 2, 2021, a jury in Cumberland County Superior Court convicted McCormick of two counts of human trafficking, five counts of promoting prostitution, and possession with intent to sell or deliver cocaine. See State v. McCormick, 289 N.C. App. 631, 888 S.E.2d 408, 2023 WL 4340723, at *1, 4 (2023) (unpublished table decision), appeal dismissed, rev. denied, 898 S.E.2d 301 (N.C. 2024); Pet. [D.E. 9] 1. "At trial, [McCormick] was represented by counsel until choosing to proceed pro se." McCormick, 2023 WL 4340723, at *2. The State presented substantial evidence that McCormick supplied women with drugs, posted advertisements on a website offering them for sexual services in exchange for money, booked hotel rooms for them to engage in prostitution, and scheduled the dates. See id. at *2–4. Following his conviction and sentencing, McCormick "gave notice of appeal in open court." Id. at *4. On July 5, 2023, the North Carolina Court of Appeals found no error. See id. at *9; Pet. at 2. On July 13, 2023, McCormick moved for en banc reconsideration. See [D.E. 19-11]. On July 27, 2023, the North Carolina Court of Appeals dismissed that motion. See [D.E. 19-12]. McCormick then flooded the Supreme Court of North Carolina with pro se filings, including a July 25, 2023 list of constitutional questions, a July 27, 2023 petition for discretionary review, and a September 8, 2023 motion to add issues. See [D.E. 19-13, 23-4, 23-5]. On March 20, 2024, the Supreme Court of North Carolina denied McCormick's petitions. See [D.E. 26-3]; State v. McCormick, 898 S.E.2d 301 (N.C. 2024) (memorandum decision).

In addition to his direct appeal, McCormick filed several postconviction motions, including motions filed while his direct appeal was still pending. On September 15, 2022, McCormick filed

a motion for appropriate relief ("MAR") in the North Carolina Court of Appeals, which dismissed the motion on the same day. See [D.E. 19-4, 19-5]. On April 17, 2023, McCormick filed a petition for writ of habeas corpus in the Supreme Court of North Carolina, which denied the petition the same day. See [D.E. 19-9, 19-10]. On August 8, 2023, McCormick filed a MAR in the Supreme Court of North Carolina, which dismissed the motion on March 20, 2024. See [D.E. 19-14, 26-3]; McCormick, 898 S.E.2d at 301. On September 22, 2023, McCormick filed a second petition for writ of habeas corpus in the Supreme Court of North Carolina, which denied the petition on September 26, 2023. See State v. McCormick, 891 S.E.2d 569 (N.C. 2023); Pet. at 3; [D.E. 19-15, 19-16]. McCormick alleges that he filed either a MAR or a "habeas corpus" in Moore County Superior Court in June 2022 which that court denied on July 13, 2022, but that he did not file any appeal. Compare Pet. at 7–8, with [D.E. 21] 4. Counsel for respondent "has not located this filing to submit as an exhibit to this Court." [D.E. 19] 4 n.3.

In his section 2254 petition, McCormick makes eight claims. First, McCormick argues that the detective who conducted the investigation fabricated evidence against McCormick. See Pet. at 8–10. Second, McCormick argues that he was charged with new criminal offenses in violation of state law and the United States Constitution after the state court conducted a probable cause hearing and dismissed two criminal charges. See id. at 10–11. Third, McCormick argues that the trial court lacked jurisdiction because grand jury witness testimony was not recorded. See id. at 11–13. Fourth, McCormick argues that the grand jury indicted McCormick for a criminal offense in a different county. See id. at 13–14. McCormick raised these four claims in the state court habeas petitions and the MAR he filed in the Supreme Court of North Carolina. See id. at 8–14; [D.E. 19-10, 19-14, 19-15]. Fifth, McCormick argues that the evidence was insufficient to convict him for human trafficking. See Pet. at 4–5. McCormick made this argument on direct

appeal. See McCormick, 2023 WL 4340723, at *4–5; [D.E. 19-6, 19-13]. In claims six through eight, McCormick argues that the trial court erred by admitting evidence obtained during an "unlawful arrest" and by failing to give a requested jury instruction, and that he received ineffective assistance of appellate counsel. See Pet. 5–6. The court assumes without deciding that McCormick raised these claims in his July 25, 2023 or September 8, 2023 filings in the Supreme Court of North Carolina. Compare [D.E. 23-4, 23-5] and [D.E. 27], with [D.E. 19] 5 and [D.E. 26] 2.

A motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted tests the legal and factual sufficiency of the complaint. See Fed. R. Civ. P. 12(b)(6); Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); Coleman v. Md. Ct. of Appeals, 626 F.3d 187, 190 (4th Cir. 2010), aff'd, 566 U.S. 30 (2012); Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008); accord Erickson v. Pardus, 551 U.S. 89, 93–94 (2007) (per curiam). A court need not accept a complaint's legal conclusions drawn from the facts. See, e.g., Iqbal, 556 U.S. at 678. A court also "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." Giarratano, 521 F.3d at 302 (quotation omitted); see Iqbal, 556 U.S. at 678–79. Moreover, a court may take judicial notice of public records, such as court records, without converting a motion to dismiss into a motion for summary judgment. See, e.g., Fed. R. Evid. 201; Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 322 (2007); Philips v. Pitt Cnty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009).

A motion to dismiss a section 2254 petition "tests the legal sufficiency of the petition, requiring the federal habeas court to assume all facts pleaded by the [section] 2254 petitioner to be true." Walker v. Kelly, 589 F.3d 127, 139 (4th Cir. 2009) (quotation omitted); see Wolfe v. Johnson, 565 F.3d 140, 169 (4th Cir. 2009). In ruling on a motion to dismiss, the court looks to

the record of the state habeas proceeding, including affidavits and evidence presented in such proceedings, as well as other matters of public record. See Cullen v. Pinholster, 563 U.S. 170, 180–81 (2011); Walker, 589 F.3d at 139.

Respondent seeks dismissal of the petition as "a mixed petition because the petition contains both unexhausted and exhausted claims." [D.E. 26] 4; see id. at 4–6. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, imposes a "total exhaustion rule[,]" and a court "cannot" adjudicate a mixed petition. Jones v. Bock, 549 U.S. 199, 221 (2007); see Rhines v. Weber, 544 U.S. 269, 273–74 (2005); Rose v. Lundy, 455 U.S. 509, 522 (1982); Samples v. Ballard, 860 F.3d 266, 269 n.2 (4th Cir. 2017). When presented with a mixed petition, the court may dismiss the petition without prejudice, stay the petition to allow the petitioner to return to state court and exhaust all of his claims, or "allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief." Rhines, 544 U.S. at 278; see Rose, 455 U.S. at 520.

McCormick contends that he exhausted all of his claims. See [D.E. 21]; [D.E. 24]; [D.E. 25]; [D.E. 27]. In order to exhaust a claim under the AEDPA, a petitioner must "fairly present [his] federal claims to the state courts in order to give the [s]tate the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." Duncan v. Henry, 513 U.S. 364, 365 (1995) (per curiam) (cleaned up); see, e.g., Picard v. Connor, 404 U.S. 270, 275 (1971); Jones v. Sussex I State Prison, 591 F.3d 707, 714 n.2 (4th Cir. 2010); Baker v. Corcoran, 220 F.3d 276, 288 (4th Cir. 2000); Mallory v. Smith, 27 F.3d 991, 994 (4th Cir. 1994). A claim is "fairly presented" if the petitioner presents to the state court the "substance of his federal habeas corpus claim," including "both the operative facts and the controlling legal principles." Pethtel v. Ballard,

617 F.3d 299, 306 (4th Cir. 2010) (cleaned up); see Mahdi v. Stirling, 20 F.4th 846, 892 (4th Cir. 2021). "The burden of proving that a claim is exhausted lies with the habeas petitioner." Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998); see Shinn v. Ramirez, 596 U.S. 366, 378 (2022); Mallory, 27 F.3d at 994.

McCormick has not demonstrated that he exhausted all of his claims by fairly presenting them to the state courts before filing his habeas petition. "[T]he burden of demonstrating fair presentment lies with the habeas petitioner, who must do more than scatter some makeshift needles in the haystack of the state court record." Jones, 591 F.3d at 713 (quotation omitted); see Bowie v. Branker, 512 F.3d 112, 122 (4th Cir. 2008); Mallory, 27 F.3d at 995. Moreover, each claim in the petition "must be presented to a state court in accordance with state procedure." Mallory, 27 F.3d at 992; see Shinn, 596 U.S. at 378; N.C. Gen. Stat. § 15A-1420; Amerson v. Ishee, No. 1:23CV579, 2024 WL 3502996, at *5 (M.D.N.C. June 5, 2024) (unpublished), report and recommendation adopted, 2024 WL 3498357 (M.D.N.C. July 22, 2024) (unpublished), appeal filed, No. 24-6728 (4th Cir. Aug. 1, 2024); Parker v. Joyner, No. 1:13-CV-45, 2014 WL 285654, at *2 (W.D.N.C. Jan. 24, 2014) (unpublished); McNeil v. Whitener, No. 5:11-HC-2058, 2012 WL 4086510, at *5 (E.D.N.C. Sept. 17, 2012) (unpublished). Finally, the court rejects McCormick's conclusory alternative arguments that the court should excuse his failure to exhaust all of his claims because he is "actual[ly] innocent . . . where the conviction was based off 'emotions' and not based off the evidence" and because the Supreme Court of North Carolina inordinately delayed in processing his appeal and thereby prevented him from exhausting all of his claims before filing in federal court. [D.E. 24] 1; [D.E. 25] 1; cf. Shinn, 596 U.S. at 385; Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam); Mahdi, 20 F.4th at 893 n.32; Ward v. Freeman, 46 F.3d 1129, 1995 WL 48002, at *1 (4th Cir. 1995) (per curiam) (unpublished table decision); Amerson, 2024 WL

3502996, at *5 n.2; Norris v. Williams, No. 8:21-CV-03353, 2023 WL 5516157, at *7–9 & n.7 (D.S.C. July 27, 2023) (unpublished), report and recommendation adopted, 2023 WL 5509355 (D.S.C. Aug. 25, 2023) (unpublished); Plymail v. Mirandy, No. 3:14-6201, 2017 WL 4280676, at *7 (S.D. W. Va. Sept. 27, 2017) (unpublished). Accordingly, McCormick has presented the court with a mixed petition.

Ordinarily in these circumstances the court "should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims." Jones, 549 U.S. at 222 (cleaned up); see Rhines, 544 U.S. at 278; Carter v. Va. Dep't of Corr. Dir., No. 22-6858, 2024 WL 511039, at *1 (4th Cir. Feb. 9, 2024) (per curiam) (unpublished). Here, however, the court need not offer this option to McCormick because he has not asked to amend his petition and has ample time remaining under 28 U.S.C. § 2244(d)(1) to "exhaust his claims in state court and return to federal court[.]" Ross v. West, No. CV 19-3338, 2020 WL 1491364, at *2 (D. Md. Mar. 25, 2020) (unpublished); see Jacobs v. Bohrer, No. CV 21-357, 2021 WL 2661317, at *2 (D. Md. June 29, 2021); cf. Rhines, 544 U.S. at 275–76; Carter, 2024 WL 511039, at *1. Accordingly, the court grants respondent's motion to dismiss, dismisses without prejudice McCormick's petition as unexhausted, and denies as moot McCormick's motion to expedite.

After reviewing the claims presented in McCormick's petition, the court finds that reasonable jurists would not find the court's treatment of McCormick's claims debatable or wrong and that the claims do not deserve encouragement to proceed any further. Accordingly, the court denies a certificate of appealability. See 28 U.S.C. § 2253(c); Miller-El v. Cockrell, 537 U.S. 322, 336–38 (2003); Slack v. McDaniel, 529 U.S. 473, 483–84 (2000).

II.

In sum, the court GRANTS respondent's motion to dismiss [D.E. 18], DISMISSES WITHOUT PREJUDICE petitioner's petition for a writ of habeas corpus as unexhausted [D.E. 9], and DENIES petitioner's motions [D.E. 15, 28]. The court DENIES a certificate of appealability. The clerk shall close the case.

SO ORDERED. This 12 day of August, 2024.

J. Dever

JAMES C. DEVER III
United States District Judge

FILED: March 18, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6887
(5:23-hc-02131-D-RJ)

MARKUS ODON MCCORMICK

Petitioner - Appellant

v.

WARDEN DANIEL EVERETT

Respondent - Appellee

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 40. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

"Appendix C"